

Jurisprudence and Karl Popper's Philosophy of Science

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Abstract

This paper examines the status of law as a science through the lens of Karl Popper's Philosophy of Science. While jurisprudence is commonly taught as a branch of legal sciences, Popper's criteria for scientific theory—falsifiability—challenges this view. According to Popper, a theory must make testable predictions that can be proven true or false, a requirement that law fails to meet due to its reliance on subjective interpretation. Using Popper's framework, this study explores the nature of jurisprudence, considering insights from influential legal scholars such as Oliver Wendell Holmes Jr., Antonin Scalia, Richard Posner, and Suri Ratnapala. The research suggests that law is not a science but rather a pseudo-science, given its flexibility and dependence on individual judgment. The paper concludes that jurisprudence should be understood as an operational tool rather than a scientific discipline, with its primary function being the guidance of legal practice and decision-making rather than objective prediction.

Keywords

Law, Jurisprudence, Karl Popper, Science, Philosophy of Law, Pseudo-Science, Legal Theory

1. Introduction

At college, students are accustomed to seeing Law as a Science, hence, something predictable, logical, palpable. However, as we read in the newspapers or watch TV, the judges of the Supreme Court are continually debating about some themes, and most of the time they open up divergence. And people cannot guess how the Court will decide in polemic subjects.

Sometimes, there is not even a hint. The Constitution is open and free interpretation can modify solid positions. Judges play with rethoric, turning Court decisions

theatrical. At this point, Law could not be farer than Science, because it does not follow premisses or obeys patterns.

Samir Okasha, in the book “Philosophy of Science”, recalls Karl Popper’s requirement to define Science: the theory must be *falsifiable*. It means that to be Science, the theory must bring some definite predictions that can be tested against experience. Popper talks about pseudo-science, mentioning the psychoanalysis as an example. For him, “*Freud’s theory could be reconciled with any empirical findings whatsoever*” (Okasha, 2016).

Hence, according to the ideas of Karl Popper, Law would be a pseudo-science, because it is not falsifiable. It is not possible to predict a sentence of a judge or the behavior of the Court in any theme; anytime; anywhere. The result of the trials can not be tested against experience.

But if Law is not a Science, as many university scholars teach the undergraduate students, what in fact is Law? We will try to find answers between remarkable authors, all of them of Common Law tradition, like Oliver Wendell Holmes Jr., Sir William Blackstone, Antonin Scalia, Richard Posner and Suri Ratnapala.

2. Theory of Science

It is very usual to see in modern universities Jurisprudence taught as a branch of Science—the Science of Law. At University os São Paulo, the college I graduated, Law used to be called “ciências jurídicas” (legal sciences).

The scientific approach of Jurisprudence goes back to Hans Kelsen. He introduced his Pure theory of Law in Madri in 1933. To the German author, Law would be a branch of Science like any other—such as Mathematics or Physics—and could be studied with rigorous scientific method (Kelsen, 2009).

Law would be an autonomous branch of Science, different from Politics, Sociology, History, Psychology or Language. The object of the study of Law should be only the rule of Law and its basement should be the fundamental standard—the Constitution. The Law scientist should do an impartial analysis of the rules—any relation between Law and other sciences shouldn’t be explored—or the final result would be spoiled.

The positivist theory of Law was a very innovative proposal at the time and helped the development of Jurisprudence. Many students colaborated in respectable researches of new subjects related to Law. As from Kelsen, Tax, Criminal or Labour Law would be better developed.

Nevertheless, the general vision that Law is a Science, like Chemistry, and as a consequence, predictable, started to seem nonsense. Law was said to be a Science, without any sober fundamentation. Jurisprudence was treated in a nihilistic way. Law would be everything and at the same time nothing—which showed the indifferent approach of some Law universities.

To solve the question, it is important to come back to one of the most important philosophers who studied Science, Karl Popper, an austrian author. He presented the theory of Science, which considers Science only the theories that are falsifiable.

A scientific theory can bring predictions that can be proved true or false by future verifications. The theories that were not Science were considered Pseudo-Science—metaphysical or mythological claims (Thornton, 2023).

Science would be developed by a series of hypothetical thesis that could be proved right or wrong. Some researchers present a hypothesis that the scientific community could later prove to be right or wrong. If wrong, another scientist should bring another thesis, that can, in some moment, be proven right. The constant researches bring innovation and knowledge—that is Science.

For this reason, Karl Popper argued that History was a pseudo-science. It was not falsifiable, because the facts could be told in different manners, according to the historian. As so was Psychology, due to the subjective interpretations that could be made by the psychiatrist.

There comes an important question—Jurisprudence, according to Karl Popper, Science or Pseudo-science? What is Law about?

3. Popper's Methodology for "Social Sciences"

Popper argued that the study of social sciences could be made by individual methodology and situational analysis. It is important to say that these subjects could be studied, but were not Science, because the scientific method—the constant verification of the hypothesis—could not be applied for them (Popper, 2005).

Hence, History and Psychology could be analysed through a personal methodology or through a certain situation. These are subjective approaches, and must be understood in a critical way. Similarly to Jurisprudence, the study of the Law should not be done using the scientific method, otherwise would be innocuous.

Actually the situational analysis fits well Jurisprudence. The predictions can be made through an austere observation of the character of the judges and the polemic themes under trial.

Richard Posner, a New York author, born in 1939, professor of the Chicago Law School, and judge of Court of appeals of the seventh circuit from 1981 to 2000, created a guide to understand the decisions of the magistrates, all described in his book "How judges think", released in 2010.

In this work the author demonstrates that judges decide to take many things in consideration, not just precedents themselves. Political issues, economic issues, salarial issues, job issues, personal past issues are equally important when judges decide: "*A judge's personal background characteristics, such as race and sex, and his personal and professional experiences are among the nonpolitical, nonlegalist factors that have been found to influence his decisions*" (Posner, 2008).

Actually, he developed some models of judicial behavior; these models are related to sociological observation, and they do not suit to all judges. Therefore, as a guidance of social behavior that depends too much on how Society is in a period of time.

Posner's work is an example of Popper's methodology study of social sciences, as it is a study made through individual methodology and situational analysis.

4. Law as a Pseudo-Science

Law is a Pseudo-science. Besides all the theoretic construction of the positivists and the work of Hans Kelsen, according to Karl Popper's theory, Law is not Science.

Law is not falsifiable, because, as History and the Psychology, it can not bring predictions that can be proven true or false in the future. Jurisprudence is too flexible and relies too much on interpretation. In other words, it is a subjective matter and can not be researched with impartial distance. It suits the interests of the performer.

Actually, situational analysis impacts the interpretation of jurisprudence. Some positions were fixed many years ago and they are changing as the society changes its mind. For instance, decades ago, theft was not tolerated in any situation, but nowadays, it is discussed if theft in starving situation should be considered a crime. If a subject changes as time pass, it can not be falsifiable.

At college, students are accustomed to seeing Law as a Science, hence, something predictable, logical, palpable. But after analysing Karl Popper's work it is crucial to define Law as a pseudo-science. The scientific approach of the Law is innocuous. In other words, it does not make any sense.

It is not possible to subsume Law to scientific investigation due to subjectivity. Therefore, while the agent is researching his subject, his inner concepts mix with the object of the analysis. Law is not a static and neutral object of study, like numbers or Chemical elements. Law is mutable and depends on the interpretation of a person. And the interpretation is always subjective, in a sense that is related to personal convictions.

The theory of Science showed by Karl Popper does not apply to Law—because Jurisprudence varies, as Richard Posner explains, according to the judge. The result of a trial is not (always) predictable, because it depends on many circumstances that vary according to the momentum.

If we make a question about Law, for instance, “is theft forbidden?” There would not be objective answers. The answer depends on the country, religion and situation. It can be forbidden to steal a cell phone at street, but it can be tolerated to steal a bread by a starving person.

Property rights is another subject that can be tested to see if Law is Science or pseudo-science. In a case of trespassing of unproductive land, some judges consider it legal and some judges consider it illegal. If we say that trespassing is forbidden, it is not possible to verify if it is true or false, because the matter changes as individual beliefs of the magistrate.

Law does not bring hypotheses that can be answered by future investigations. It can not be proven true or false. Law is related to argumentation, rhetoric discourse. Therefore, it depends on the message told by some person – like History or Psychology, it relies on subjective interpretation. That is why Law is a pseudo-science, and can be studied through methods applied only for “social sciences”.

Law certainly is not a Science, but a branch of Politics. If we understand who is the political group in power and what are its interests it is clear to see how the

Courts will decide. But it demands sensitivity to study the relations of power; again, it is not Science and it is not falsifiable. It is related to social observation. A watchful and careful observer of the society can act as a successful lawyer, more than an academic scholar, because he can explain better the interests involved in a case and how the judges tend to face the problem in this context.

5. Instrumental Nature of the Law

It is clear that Law is not Science. However, what is Law about? What is the role of the lawyers, if not deal with Science?

Antonin Scalia was a New Jersey born of Italian ancestry who had a catholic education and worked as a lawyer in Ohio, as a teacher at Virginia Law University, as an assistant of the Attorney General in the US Department of Justice, as judge in the US Court of appeals of Columbia circuit and finally as associate judge of the US Supreme Court. He was appointed by Ronald Reagan in 1986 to the job and worked until the year of 2016, when he died.

The judge wrote his book “A matter of interpretation—federal courts and the Law” in 1997 to a very interested audience, in which he talks about Common Law, democratic legislation, jurisprudence, legislator intentions, textualism, canons and presumptions, legislative history, constitutional interpretation and flexibility and liberality of live constitution.

The author in his essay says that Common law is a law developed by judges and resembles art or game, rather Science, because it can be adjusted to suit any occasion: “*Within such a precedent-bound common-law system, it is critical for the lawyer, or the judge, to establish whether the case at hands falls within a principle that has already been decided. Hence the technique—or the art, or the game—of ‘distinguishing’ earlier cases. It is an art or a game, rather than a science, because what constitutes the ‘holding’ of an earlier case is not well defined and can be adjusted to suit the occasion*” (Scalia, 2018).

To Scalia Law would be so malleable and fittable to any situation that could not be considered Science, but a human manifestation that is not falsifiable or entirely predictable. Law is an art or a game because depends on the talent of the lawyer to predict and suit the rule to the occasion.

The role of the lawyers, as Scalia defends, is to subsume a case to a principle that has already been decided, or “distinguishing”, and with that in mind try to advise a client or file an action. The occupation is much more related to divination, guessing, fortune-telling, than scientific analysis. An art or a game, as mentioned by the American author.

Consequently, Law is a way to subsume the chaos and mess of a society in something tidy and predictable. It demands lots of time and energy to create patterns and rules and adequate this mess in these formats. And it is not granted that this “machine” of rules will work everytime it is demanded. As the Courts are formed by human beings, and human beings are animals with ideologies, and ideologies are not logical, the result of a trial is not a 100% predictable and verifiable as well.

Men tend to disguise inner ideologies with rational discourse. In the same way, legal rethoric can be used as an instrument to personal convictions. In this way, Law can be the art of disguise and mistification of inner intentions and individual interests.

As Oliver Wendell Holmes Jr defends in “The path of the Law”, *“If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy”*.

Law should be viewed as an instrumental way—Law as a tool to reach something. Law in this sense would be a strategical device to guarantee the victory in court or a social benefit.

Oliver Wendell Holmes Jr., for instance, in his essay “The path of the Law”, wrote in 1897, describes the Law, as a “path”, a way to reach something.

He was a 1841 Massachussets born, professor of Law in Harvard Law School, chief Justice of the Supreme Court of the state of Massachussets, and finally associate justice to US Supreme Court, appointed in 1902 by Theodore Roosevelt. He worked more than 50 years as magistrate; 20 at Massachussets Court and 30 at the US Supreme Court. He retired in 1932, with 91 years old.

He did not consider Law a Science as well. He sees Law as a profession, a business, in which lawyers make predictions to their clients. The more accurate the lawyer, the better he is: *“when we study law we are not studying a mystery but a well-known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court (...) People want to know under what circumstances and how far they will run the risk of coming agaisnt what is so much stronger than themselves, and hence it becomes a business to find out when this Danger is to be feared. The object of our study, then, is prediction, the prediction of incidence of the public force through the instrumentality of the courts”* (Holmes Jr., 2011).

For him, Law is not a Science, but a way of guessing what the Courts will decide, and the teachings you can subsume to advise your clients. It demands permanent observation of the decisions of the judges, which changes in conformation of the demands of the society. Law in this sense is continuing changing and the true Lawyer would follow all its shifts. As it is related to prediction, it is not objective and it has not scientific basement.

The vision of Sir William Blackstone of the Law was in the same way, pragmatical and not scientific.

In his magna opus, he describes law as a rule of action dictated by a superior to a subordinate, that must be coordinated to the law of nature: *“This, then, is the general signification of law, a rule of action dictated by some superior being; and, in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of human action or conduct; that is, the precepts by which man, the noblest*

of all sublunary beings, a creature endowed with both reason and free-will, is commanded to make use of those faculties in the general regulation of his behaviour.” (Blackstone, 1753)

The author mentions the law of revelation as well as a foundation of human law: “*Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these*”.

William Blackstone was an English born Law, jurist of the 18th century, who wrote the Commentaries on the Law of England, basis of the study of the common law in various countries. He was a Doctor of Civil of Law at Oxford University, member of the Parliament and solicitor general of the queen.

As a rule of action dictated by a human to another human being, that is founded in the laws of nature and revelation, we deduce that law to Sir Blackstone is not Science. This view is much related to the British monarquic context, in which a personal command from a superior to his subordinate is considered Law. It is connected to the position of the subject in the society and could have emotional foundation.

Professor Suri Ratnapala shares with Scalia, Wendell Holmes and Blackstone a more pragmatic view of Jurisprudence. Ratnapala is a Sri Lanka born, emeritus Professor of Public Law at the University of Queensland, Australia.

His book Jurisprudence, of 2009, is an actual overview of the legal theory and philosophy. He approaches some legal movements of 20th and 21st century, such as classical natural law, positivism, American and Scandinavian realism, sociology of law and Law & Economics.

Professor Suri, as the other authors mentioned above, does not consider law a Science. His vision is that law is as mix of statutes and precedents, that are decoded and organized by the receptor of the message, the lawyer, to advise himself or someone: “[...] *A good lawyer is one who knows when to argue strictly from statutes and precedents, when to re-interpret laws or distinguish precedents and when to appeal to policy, justice or good sense of the judge. This is the stuff of jurisprudence. Make no mistake: jurisprudence sharpens legal professional skills.*” (Ratnapala, 2013)

Law to Ratnapala is not Science as well; his vision is near to Holmes’—a knowledge built with professional intentions, not universal or scientific ones. Law is a way to organize a series of rules and precedents aiming a better prediction and a better professional advice.

6. Conclusion

At college, students are accustomed to seeing Law as a Science, based on positive theory of Law. They consider Jurisprudence predictable, logical, palpable. However, analysing Karl’s Popper Theory of Science and the Papers of important authors of Common Law tradition, it is possible to say that the scientific approach of the Law is innocuous. In other words, it does not make any sense.

The theory of Science showed by Karl Popper does not apply to Law—because Jurisprudence varies, according to the judge. The result of a trial is not (always) predictable, because it depends on many circumstances that vary according to the momentum.

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What differs the scientific approach to the pragmatic approach is the level of attachment to the rules. If we deal with the subject "Labour Law", for instance, a legal scientist would try to solve problems using only the rules—and if the rules does not bring any solution the dispute should be unsolved. However, the pragmatic approach would see the main interests prevailing in society, then the rules, and then solve the dispute.

That is why the pragmatic approach of Jurisprudence makes more sense over the scientific approach. Although eccentric and ironic, Scalia's approach makes more sense, and helps Law workers to deal with their jobs.

Therefore, the pragmatic approach of the Law is not just the most fruitful and realistic study of Jurisprudence but the most comfortable to the legal audience. It deals with the legal object as it is—and not as it should be.

In conclusion, it is possible to say that Law is not Science, according to Karl Popper's theory. As Law is all related to human behavior, it is not falsifiable. Law doesn't subsume to universal or atemporal rules and it is not an objective phenomenon, that can be described methodologically by a scientist.

Law is a pragmatic knowledge, with professional use. It is an art or a game of prediction with interest load and pecuniary issues.

The scientific approach of Jurisprudence is innocuous as the scientific methodology can not accurately predict the decisions of all Courts. The pragmatic approach, as shown by these five authors, adapts better to the day to day occupation of the attorneys.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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